HONIGMAN ALERT

Labor and Employment Department **December 6, 2011**

Are Employees Protected When Using Social Media?

Over the past several months, the National Labor Relations Board (NLRB) has made several rulings regarding employees who use social media when discussing work or working conditions. The NLRB's position on this critical issue is important even if your company is **not** unionized. In certain circumstances, the NLRB views an employee's online posts as constituting protected "concerted activity" under Section 7 of the National Labor Relations Act (NLRA), even if the employee is not a member of a union. Section 7 protects the rights of all employees (unionized or non-unionized) to discuss terms and conditions of employment and conduct union organizing activities.

With respect to social media, the NLRB's position is that employers are prohibited under the NLRA from disciplining or discharging employees for engaging in protected, concerted activity online (or elsewhere). If an employer discharges, disciplines or even threatens to discipline an employee for protected, concerted activities, the employer may find itself liable for back pay as well as other damages and re-instating the employee.

The NLRB considers speech to be concerted activity if the speech concerns terms and conditions of employment or addresses union organizing. Therefore, an employee's individual gripe with a supervisor or complaints about coworkers usually are not protected. On the other hand, the NLRB will almost always consider speech seeking to mobilize other coworkers to address an issue involving terms or conditions of employment to be concerted activity. In the words of the NLRB, to constitute concerted activity, the activity or the speech must be "engaged in, with, or on the authority of other employees, and not solely by and on behalf of the employee himself."

Cases Where the NLRB Found That Social Media Activity Was Concerted Activity and, Therefore, Not Properly Subject to Discipline

- A *non-union* salesperson for a luxury automobile dealership posted pictures on his personal Facebook account of food being served at his employer's sales event, accompanied with comments from coworkers about the cheap and inexpensive nature of the food. The salesperson was discharged for this posting. The NLRB found the salesperson had engaged in concerted activity because the coworkers had a legitimate concern regarding the quality of food being served during the sales event, as such food could negatively affect their sales and commissions.

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- Several *non-unionized* employees were discharged due to an online, non-working hours, obscenity-filled discussion regarding an employee who was criticizing their work performance. The NLRB administrative law judge found, since the employees reasonably believed the complained-of employee could go to management with her criticisms, they were discussing terms and conditions of employment, a concerted activity. The employees were reinstated and awarded backpay.
- An employee complained on a blog because her supervisor did not allow the employee to consult a union representative when she was being disciplined. Her employer suspended and then terminated her for the blog posting. The NLRB held that such disciplinary action violated her right to engage in concerted activity; to discuss her right to a union representative as provided by law.
- Two employees were discharged by their employer due to a discussion on Facebook regarding their employer's failure to withhold income taxes from their paychecks and complete necessary tax paperwork. Two of the employer's customers also engaged in the Facebook conversation. The NLRB held that the employees' terminations were unlawful because they interfered with the employees' rights to engage in legitimate discussions of terms and conditions of employment.

Cases Where the NLRB Found That Social Media Activity Was Not Concerted Activity and, Therefore, the Employer Could Lawfully Discipline Employees

- A *non-union* newspaper reporter posted unprofessional and inappropriate "tweets" on a personal Twitter account that his employer encouraged him to use. The employer also listed the reporter's Twitter site in its newspaper. The reporter's tweets insulted rival news reporting companies and embarrassed his employer. The NLRB held that such postings were not concerted activity, as his conduct was not related to terms or conditions of his employment and the comments did not seek to involve other employees.
- A *non-union* bartender at a bar and grill posted on his personal Facebook account that he was upset with his employer's tipping policy. He also commented that his employer's customers were "rednecks" and that he hoped they died choking on a glass as they drove home drunk. The activity was not concerted activity because the bartender was simply airing an individual gripe with management and was not seeking to mobilize the employees to address terms and conditions of employment.
- An employee of an ambulance service wrote on the Facebook wall of her state's U.S. Senator, telling him that her company paid $2 less than the national hourly average and was unprepared to perform CPR and basic medical functions. The NLRB held that her conduct was not concerted activity, as her comments constituted individual gripes, did not concern other employees, and failed to address terms and conditions of employment.
- A *non-unionized* employee of a nursing home was found not to have engaged in concerted activity when she posted on Facebook offensive comments about her employer's mentally disabled clients. The comments did not concern terms or conditions of employment and did not seek to cause employees to collectively address an issue.

A Word About an Employer's Social Media Policies

The NLRB has also held that employers are not permitted to have "overbroad" social media policies. The NLRB considers a policy to be "overbroad" if it is unclear regarding whether an employee can exercise his or her rights under the NLRA, such as the right to address terms and conditions of employment in an organized fashion with other employees. For example, a policy stating "the company will not tolerate any internet postings which embarrass the company or call its integrity into question" is considered unlawful by the NLRB because the policy could be interpreted as preventing an employee from posting legitimate concerns online and inviting other employees to act on those concerns. The NLRB has also found a policy to be "overbroad" when it prohibited employees from posting online any pictures of them holding or wearing anything with the company's name on it. The NLRB ruled that such a policy could prohibit employees from posting pictures of them picketing in front of their workplace, which would violate their right to organize or to seek to change terms and conditions of employment.

Action Steps

Employers should consult with their attorney before implementing any new social media or blogging policy to ensure that it does not run afoul of the NLRB's rulings. Furthermore, employers must ensure that an employee was not engaging in protected activity under the NLRA (or any other applicable statute) before disciplining him or her for internet use outside of the workplace. If you require assistance in reviewing an existing, or drafting a new, social media policy, or determining whether an employee's online postings constitute protected activity, please contact a member of our Labor and Employment Department.